DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-213723 **DATE:** June 26, 1984

MATTER OF: International Business Investments, Inc.

DIGEST:

1. Protester alleging that specifications overly restrict number of vehicles to be used to perform contract has burden of proof to show that the limitation and agency determination of needs are clearly unreasonable. Burden is not met where restriction is not as limited as protester asserts and protester has not demonstrated that performance is not possible with number of vehicles required.

2. Ceiling provision in escalation clause providing for prices to be adjusted at the beginning of each option period to reflect changes in Service Contract Act determinations constitutes a reasonable exercise of procuring activity authority. Agency may properly allocate risk of possible loss due to excessive labor cost increases on contractor.

3. Inclusion of two wage rate determinations allegedly for the same labor category is not subject to GAO or court review; a challenge to such a Service Contract Act wage determination must be processed through the administrative procedures established by the Department of Labor.

4. Protest against liquidated damages clause requires showing by protester that there is no possible relationship between damage rate being protested and losses in contemplation at the time the contract is initiated.

International Business Investments, Inc. (IBI), protests the award of a contract for guard services to TATT Companies International, Inc., under solicitation No. GS-07B-21600/7SB issued by the General Services Administration (GSA).

We deny the protest.

IBI asserts that the solicitation is defective because it requires the bidders to bid on the basis of supplying only one patrol vehicle when the contract performance requirements necessitate the use of more than one such vehicle. IBI also asserts that the solicitation contains a price escalation clause which is unfair and defective because it fails to adequately provide for the possible effect of required wage increases. In addition, IBI protests that the solicitation improperly contained two different wage determinations for the same labor categories and that it contained an improper deduction clause for work not adequately performed by the contractor.

IBI sought injunctive relief in the United States District Court for the Western District of Texas pending the issuance of a decision by our Office. Subsequently, the parties agreed to a stay of proceedings pending receipt by the court of our opinion on the protest.

There are two separate relevant solicitation provisions relating to the contractor supplying a patrol vehicle.

One provision states:

"PATROL VEHICLE REQUIREMENTS [Exhibit 3]

"2. Contractor Furnished Vehicle(s)

"The contractor shall furnish a vehicle or vehicles, as indicated below, which shall be used for patrol for IRS Service Center, Treasury, and VA Data Center only.

"The vehicle(s) shall carry distinctive markings of the company, and shall be equipped with a rotating emergency roof light in compliance with applicable state and local laws. The vehicle(s) shall be available at all times during the life of the contract and must be replaced immediately by a replacement vehicle if removed from the operation for any reason(s). It is the contractor's responsibility to register, insure, and provide proper maintenance for the vehicle(s). The vehicle(s) shall be equipped with a ten (10) to fifteen (15) pounds portable, dry chemical, ABC extinguisher, installed and maintained in

accordance with NFPA 10, Portable Fire Extinguishers. The fire extinguisher(s) shall be readily accessible at all times. In addition, the vehicle(s) shall be equipped with a conventional, universal, first aid kit with Airway pack, Cling bandages, and a minimum of two (2) bite sticks.

"The Contracting Officer's Representative is responsible for ensuring that the vehicle(s) furnished under this provision comply with the requirements outlined above. In the event of a dispute regarding whether vehicle(s) meet the requirements the Contracting Officer will make the final decision.

"3. Vehicle Requirements.

	Vehicle 1	Vehicle 2	Other
"Estimate(s) of hour(s) to be used daily	24	None	None
Number(s) of days per week	7		
"Estimated miles per day	90"		

The other clause provides:

"(4) Motorized Patrol Equipment: Equipment as described in Exhibit 3, Patrol Vehicle Requirements, shall be provided by the Contractor. Vehicles shall be in operating condition at all times. All costs for the operation and maintenance of vehicle(s), including all license and insurance fees, shall be borne by the Contractor. Each vehicle shall be equipped with a roof light and marked for identification. The vehicle(s) shall be equipped with a first-aid kit and dry chemical fire extinguisher, properly mounted. In the event a patrol vehicle is temporarily inoperable (due to maintenance, etc.), an equivalent, fully operational, substitute vehicle, shall be provided by the Contractor. The contracting officer's representative is responsible for ensuring the vehicle(s) furnished under this contract comply with the requirements outlined herein. In the event of

a dispute regarding whether vehicle(s) meet the requirements, the contracting officer will make the final decision. Additional patrol equipment not required by this contract shall not be used unless approved by the Contracting Officer's Representative. See Exhibit 3, Patrol Vehicle Requirements.

(X) REQUIRED	(X) NOT REQUIRED
IRS Center, VA Data Center, Treasury only	All other locations listed"

IBI contends that the effect of these provisions is to restrict the bidder to providing only one patrol vehicle when there must be such a vehicle in use 24 hours a day, 7 days a week, and it is not feasible to provide all services required under the solicitation, most particularly the transportation of contractor supervisory personnel between different jobsites, with only one such vehicle.

GSA contends that the solicitation does not restrict the bidders to providing only one vehicle. GSA points out that the allegedly restrictive clauses in question actually serve only to require the contractor to provide a minimum of one properly equipped and marked patrol vehicle, available for use constantly, which is approved by the contracting officer as meeting the special equipment needs. GSA points out that there is nothing in the solicitation which prevents the contractor from utilizing an unequipped vehicle, without contracting officer permission, for such functions as the movement of supervisory personnel. We agree. In particular, we note that the clause restriction on additional vehicles refers only to "patrol" vehicles, not to other vehicles which could transport personnel.

IBI's contention that the geographical area to be served is too large to be handled by one patrol vehicle presents a question of the agency's minimum needs. The determination of an agency's minimum needs and the methods of accommodating these needs are primarily the responsibility of the procuring agency, which has broad discretion in this regard. Integrated Forest Management, B-200127, March 2, 1982, 82-1 CPD 182. This is because the agency officials who are familiar with the conditions under which supplies or services have been used, in the past, and how they are to be used in the future are generally in the best position to know those actual needs and, therefore,

are best able to determine them. Keystone Die Engine Company, Inc., B-187338, February 23, 1977, 77-1 CPD 128. Consequently, we will not question an agency's determination of its minimum needs unless there is a clear showing that the determination is unreasonable. Keystone, B-187338, supra.

In this instance, GSA's relevant need is that the contractor make constantly available a roving patrol vehicle which is properly marked and equipped. IBI argues that another vehicle is required in order to be able to maintain the patrol and to be able to transport supervisory personnel between various sites on the facility. However, we see no reason why this kind of transporting must be done with the patrol vehicle--it is not required under the solicitation--and there is no restriction in the solicitation on the use of another unmarked vehicle or vehicles for this purpose. Moreover, to the extent that another vehicle may be required due to breakdown or to facilitate the performance of maintenance on the vehicle, we note that the provision specifically contemplates the performance of such maintenance by the contractor and specifically requires the contractor to provide an equivalent substitute vehicle in this situation. Accordingly, we find that the contracting officer would be obligated to permit the use of an appropriately equipped replacement vehicle, under the permission clause; in fact, this would not constitute an additional patrol vehicle. The primary thrust of the contracting officer's discretion appears to be directed at being able to require that the vehicle be properly equipped and marked. There is no evidence that the clause is intended to allow the contracting officer to simply prohibit the use of other necessary vehicles, particularly since use of a substitute vehicle is specifically required in the solicitation. Thus, we find that the discretionary leeway is reasonable and is related to the services being solicited and the protester has not established that the vehicle requirement is unreasonable.

IBI's second major objection concerns the solicitation option escalation clause, which provides:

"Escalation Provision

"A. The offeror warrants that the prices submitted in response to this solicitation for option periods do not include any allowance for any contingency to cover increase costs for which adjustments are provided under this clause.

"B. The total monthly and/or hourly option price(s) shall be adjusted upward or downward by the Contracting Officer at the time each option is exercised with the adjusted price to be effective beginning the first day of the option period. In accordance with this schedule, the Contracting Officer will notify the contractor of the adjusted price(s) and will incorporate the most recent Wage Determination issued by the Administrator of the Wage and Hour Division of the U. S. Department of Labor under the McNamara-O'Hara Service Contract Act by contract amendment.

"The total monthly and/or hourly option price(s) will be adjusted in accordance with the formula contained herein, provided that the total monthly and/or hourly contract prices for the first option year as escalated shall not exceed the total monthly and/or hourly prices for the initial 12 month period by more than 10 percent. In the event the total monthly and/or hourly prices after escalation exceeds the initial 12 month period by more than 10 percent, the ceiling price (the total monthly and/or hourly price for the initial 12 month period increased by 10 percent) shall be the contract price for the first option year. Similarly, the contract prices for the second option year as escalated shall not exceed the total monthly and/or hourly prices after escalation exceeds the contract prices for the first option year by more than 10 percent, the ceiling price (the total monthly and/or hourly prices for the first option year increased by 10 percent) shall be the contract price for the second option year.

"Eighty-five percent of the total monthly and/or hourly option prices shall be adjusted upward or downward based on the percentage increase or decrease in minimum hourly wages and fringe benefits to be paid guards in the locality where the contract work is to be performed as determined by the Administrator, Wage and Hour Division, U. S. Department of Labor, and stated on the Register of the Wage Determinations and Fringe Benefits under the McNamara-O'Hara Service Contract Act. In

> determining the percentage of the increase or decrease the wage determination being applied to the option period will be compared with the wage determination applicable to the original twelve month contract period.
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> "C. When no wage determination has been issued by the Department of Labor the Federal minimum wage established by Section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. Sec. 201-219) shall apply to this contract and be used in computing adjustments in the contract price(s). In the event no wage determination is issued for the initial twelve month period but a wage determination is issued for the option period(s), the adjustment will be based on the increase or decrease in wages and fringe benefits the contractor is obligated to pay his employees by law under the Fair Labor Standards Act versus the Service Contract Act."

In effect, this provision provides a 10-percent escalation ceiling for each option year, to cover wage increases applicable to 85 percent of the total contract price. This 85-percent figure constitutes the percentage which GSA found to be representative of the average percentage of labor costs for this type of contract based on a survey of audited protective service contracts from all GSA regions. IBI contends that the 85-percent figure is inadequate, asserting that labor costs represent 90 to 92 percent of the total contract price, and that the 10-percent limitation is arbitrary and improperly low in view of the required contractor warranty not to include wage cost contingencies in its option price increases.

In Echelon Service Company, B-208720.2, July 13, 1983, 83-2 CPD 86, our Office considered the propriety of the use of a 15-percent ceiling in a similar escalation clause. In Echelon, the solicitation contained the same combination of escalation and warranty clauses against wage cost increases and the agency rationale was that the intent was to combat the excessive wage escalation that is the by-product of the Service Contract Act. In that decision, we upheld the use of the ceiling and stated:

> "We find no reason to object to the 15 percent ceiling contained in the escalation clause of the solicitation. Both the clause and the regulation upon which it is based

> reflect a policy determination to pass through to the Government the effects of changes in the wage determinations applicable to the option periods. The ceiling provision obviously places a possible limitation on a total pass-through. However, the regulation provides for the use of alternative provisions, and in the absence of any statutory or regulatory requirement that changes in wage determinations be passed through to the Government in full, we think the escalation clause used here represents a reasonable exercise of the contracting officer's discretion to develop alternative clauses. We also note that the ceiling apparently had little adverse impact on competition as the agency reports that seven bids were received in response to the IFB."

We believe that the same considerations obtain with respect to this procurement. While IBI asserts that the actual percentage of the contract, which is made up of labor costs, is closer to 90 or 92 percent than to the 85-percent figure used by GSA, GSA based its estimate on a survey of contracts for similar services. In our view, this provides a reasonable basis for its determination to use the 85-percent figure.

Further, we will not object to the 10-percent ceiling on escalation. The fact that a solicitation may impose a risk that the contractor may not be able to recover all of its costs does not make the solicitation improper. American Transparents Plastic Corporation, B-210898, November 8, 1983, 83-2 CPD 539; Diesel-Electric Sales & Services, Inc., B-206922, July 27, 1982, 82-2 CPD 84.

Furthermore, as we pointed out in Echelon, B-208720.2, supra, this ceiling was devised with what we considered to be the legitimate intention of providing an incentive to contractors to limit wage increases in their contract negotiations. The rationale was that, where such increases could simply be passed on to the government, there was no particular pressure on the contractor to negotiate in a manner to limit them; whereas, in the face of a limitation on the cost pass-through, such an incentive did come into effect. We maintain the view that this is a legitimate means to effect this result.

IBI also argues that the escalation provision fails to take into consideration certain statutorily mandated increases, such as increases in social security tax, unemployment tax and workmen's compensation insurance, as well as increased vacation pay due to increased worker longevity. The ceiling and the warranty apply only to adjustments in minimum hourly wage rates and fringe benefits for guards in the area as determined by the Department of Labor (DOL) under the Service Contract Act. As the escalation clause does not encompass increases in the kinds of costs cited by IBI, the bidder can include contingencies for such cost increases in its option year bid prices without violating the terms of either the escalation ceiling or the warranty provision.

Finally, in this regard, we point out, as we did in Echelon, B-208720.2, supra, that there was substantial competition for this contract--in this case, 13 bids were received, while, in Echelon, seven bids were received. We believe that this is a significant indication that the escalation ceiling was not unreasonble, since it did not inhibit competition for the contract.

IBI has also questioned the propriety of inclusion in the solicitation of two separate and different wage determinations which IBI alleges both apply to requirements for identical services in the same locality and are, therefore, violative of the Service Contract Act and the regulations thereunder. GSA states that the two wage determinations were provided by DOL. In this respect, because the courts have held that a prevailing wage rate determination made by the Secretary of Labor is not subject to judicial review, this Office does not review the accuracy of wage rate determinations issued in connection with solicitations subject to the Service Contract Act. A challenge to a Service Contract Act wage determination should be processed through the administrative procedures established by DOL. Geronimo Service Co., B-210057, January 24, 1983, 83-1 CPD 86. We also note that we have specifically deferred to DOL under the above rationale where a wage determination issued in a solicitation allegedly conflicted with another wage determination for the same labor category at the same facility. Contract Management Inc.; Industrial Technical and Professional Employees, B-208899, October 4, 1982, 82-2 CPD 309.

Finally, IBI protests that the solicitation contains a liquidated damages clause for failure to adequately provide required man-hours of performance, which IBI asserts is improper. Originally, IBI questioned the manner of calculation provided for in the rate table under the clause. In its report, GSA explained that the liquidated damages deduction table rate was based on a calculation of the equivalent cost of a Federal Protective Officer at a medium grade level. The intent of using this calculation was to approximate the cost to the government of providing equivalent work. It is not, as IBI suggested in its response, to calculate the exact cost of remedial performance. With respect to this kind of liquidated damages clause, the relevant question is simply whether the deduction table constitutes a penalty. In this regard, we have held that, in determining the validity of a liquidated damages clause, the only question is the relation between the amount stipulated as liquidated damages and the losses which are contemplated between the parties when the agreement is made. In order for a liquidated damages provision to be determined a penalty and, therefore, invalid, it must be conclusively shown by the protester that there is no possible relationship between the liquidated damages rate and the losses contemplated. Kleen-Rite Corporation, B-183591, July 10, 1975, 75-2 CPD 26; Massman Construction Co., B-204196, November 8, 1983, 83-2 CPD 539. Here, in effect, the protester has conceded the close numerical relationship between the liquidated damages rate and the losses contemplated.

In view of the foregoing, it is our view that the protest is without merit.

Milton J. Socolar

for Comptroller General
of the United States